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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1436

MARVIN D. BLAND, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

MARVIN D. BLAND, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARVIN D. BLAND, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 5, 1972.

OPINION BELOW

The opinion of the court below (Appendix A, *infra,* pp. 1a-15a) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra,* p. 16a) was entered on April 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, where there is substantial evidence indicating that government agents have obtained incriminating records and statements from a taxpayer through the use of trickery and deception, the resultant issue of whether or not these records and statements were voluntarily obtained should be governed by the two-step procedural requirements of *Jackson* v. *Denno*, 378 U.S. 368, as codified in 18 U.S.C. § 3501.

STATUTES AND DEPARTMENTAL DIRECTIVES INVOLVED

The statutes and departmental directives involved are set out in Appendix C, *infra*, pp. 17a-21a.

STATEMENT

Petitioner stands convicted of three counts of tax evasion in violation of 26 U.S.C. § 7201, covering the calendar years 1962, 1963, and 1964. The only question now presented is whether his defense that agents of the Internal Revenue Service obtained records and statements from him through fraud, trickery, and deceit should have been resolved under the two-step procedures prescribed by *Jackson* v. *Denno*, 378 U.S. 368, and by 18 U.S.C. § 3501. The statement that follows is abbreviated accordingly.

A. Facts Bearing on the Defense That the Records and Statements Were Obtained Through Deception, etc.

Petitioner timely moved (A. 8-16, 25-28) for an order suppressing all records and statements obtained from him by the agents of the Internal Revenue Service.

There was a full hearing thereon, and although the district court made no findings of fact, the testimony reflects no substantial factual dispute, and may be summarized as follows:

By way of essential preliminary, recognized at the outset of the opinion below on this issue (*infra*, p. 8a, note 5), the Internal Revenue Service has Revenue Agents, who conduct routine audits of tax returns, and who, if they think they have uncovered evidence of fraud, refer their cases to the Intelligence Division, whose Special Agents then investigate with a view to initiating criminal proceedings.

In the present case, petitioner's returns were submitted to the Intelligence Division at the end of September 1965 (A. 97) and assigned to one of the latter's Special Agents in October 1965 (A. 109). Revenue Agent Smith and Special Agent Carter had several interviews with petitioner, at none of which the latter was told that criminal charges against him were in contemplation (A. 48-53, 65-66, 112-114, 119).

The court below read the record as showing that (*infra*, p. 9a) "The Revenue Agent introduced the Special Agent to [petitioner] as another man with the Government. The Special Agent neither identified himself nor gave the reason for his presence. At the Special Agent's request [petitioner] Bland called his accountant who released the original records."

Petitioner, whose education had stopped in the tenth grade (A. 43), would not have known the significance of Carter's being a Special Agent even if that fact had been disclosed (A. 48-49). He did not think he had any choice with respect to remaining silent (A. 51-52).

At their November 3, 1965, interview with petitioner, the agents got all of his books (A. 121). There was a second meeting on November 9 (A. 51), and a third one on November 15 (A. 56). At that third meeting, according to petitioner (A. 56-57),

> "I asked Mr. Smith then—I was becoming real confused—what I needed to do or what was going on and if I needed to get an attorney, and Mr. Smith told me, 'No,' that I did not need an attorney, that the Govern-

> ment would not treat me that cruelly, that there would be ample time for me to get an attorney. * * * that I did not need to get one, that he felt that the case was a case of extremely bad bookkeeping, careless bookkeeping and had asked the Government to return the file to him so he could settle it."

Except as to one word, Revenue Agent Smith's contemporaneous memorandum of this third meeting, at which according to Agent Smith petitioner "was a distressed man" (A. 106), was in complete accord with petitioner's version (A. 105):

> "I also told Mr. Bland that contrary to what he may have heard about the Internal Revenue Service, they would not be so crude as not to inform him in ample time that he should obtain an attorney." (*Accord*, A. 107.)

At the first two November meetings, at which petitioner's accountant Brewer was present, the latter attempted to terminate the conference; but petitioner did not follow Brewer's advice and continued to answer the agents' questions (A. 54, 68-70).

At a final meeting, on February 10, 1966, Special Agent Carter gave petitioner a full warning, saying that he was a Special Agent investigating tax cases and that petitioner did not need to answer incriminating questions or turn over records (A. 120-21). The word "criminal," however, was not used (A. 119). But by then the I.R.S. already had all of petitioner's records; those had been turned over on the preceding November 3, when no warning had been given (A. 121, 123).

Moreover, on February 10, Special Agent Carter asserted that since he had received petitioner's records from third parties, either from Revenue Agent Smith or from petitioner's accountant Brewer, those records were not privileged (A. 123-24). That statement, as will be shown below, was of course untrue.

B. The Rulings Below

Following the hearing, the district entered an order suppressing all records, evidence, and information obtained from petitioner on or after November 3, 1965, on the ground that these were illegally obtained (A. 29-30, ¶¶ 2-3). The prosecution then moved for a rehearing (A. 148-49), after which the district court reversed itself and overruled petitioner's motion to suppress (A. 150). All of the evidence in question, documentary and testimonial, was thereupon used at the trial. The district court repeatedly denied petitioner's requests that his original motion to suppress be granted, or, alternatively, that the issue of deception or otherwise in the obtaining of his statements and documents be submitted to the jury under appropriate instructions (A. 181-82, No. 40 [Request for Charge]; A. 200-03, Nos. 11-20 [Motion for New Trial]).

The court below upheld the second ruling of the district court, denying petitioner's motion to suppress, essentially on these grounds (Appendix A, Part II, *infra*, pp. 8a-15a):

Although it is plain that the Special Agent was contemplating criminal proceedings before November 3, 1965, the Revenue Agent had full access to petitioner's records earlier, and may have copied them. While the Special Agent's silence may have been a misrepresentation had there been a duty to speak, petitioner was not misled because he did not know the difference between a Special Agent and a Revenue Agent. At the later conferences, according to the Fifth Circuit, petitioner was either advised of his rights by his accountant, or else petitioner produced nothing. The court below did not find it necessary to consider the truth or falsity of Special Agent Carter's advice that petitioner's documents were not privileged because obtained from third persons.

Although petitioner's contention that he was entitled to have the jury determine whether his records and statements

had been obtained by deceit was fully briefed in the court of appeals (Appellant's Br. 28-34; U.S. Br. 26-28), the court below did not deal with it specifically (*infra*, p. 15a).

REASONS FOR GRANTING THE WRIT

This case raises a question of continuing importance in the administration of the internal revenue laws.

Substantively the ultimate inquiry may be put in these terms: To what extent may representatives of the United States, through artful silence lulling into security the unsophisticated and the uninformed, obtain documents and statements that clearly would have been beyond the reach of a subpoena, particularly where the agents' silence is compounded by affirmative misrepresentations?

The question now actually presented, however, turns not on where the line is to be drawn, but only on how and by whom. Specifically, it is whether the two-step rule of *Jackson* v. *Denno*, 378 U.S. 368, now codified in 18 U.S.C. § 3501(a), is applicable in such circumstances, so that the trial judge must conclude with unmistakable clarity that the records and statements were voluntarily submitted, and so that, thereafter, the ultimate resolution of the issue of deceit or otherwise is for the jury under suitable instructions.

First. Our starting point is the proposition, undoubted since *Gouled* v. *United States*, 255 U.S. 298, decided more than half a century ago, that obtaining evidence by stealth or by deceit is just as much an illegal search and seizure as a forcible breaking and entering.

Therefore the substantive question here is whether government agents actually engaged in collecting evidence for criminal prosecution are acting lawfully if they obtain statements and records while sedulously avoiding disclosure of their purpose.

We submit that they are acting unlawfully, not because of anything in the doctrine of *Miranda* v. *Arizona*, 384 U.S.

436, but because such studied non-disclosure, where as here "the record at bar clearly demonstrates that before November 3, 1965, the Special Agent was contemplating criminal consequences" (Appendix A, *infra*, p. 10a), clearly amounts to a deceit.

If the interviews here in question had taken place after October 1967, and there had been a similar failure to mention contemplated criminal consequences, then, very plainly, a flagrant violation of agency directives (Appendix C, *infra*, pp. 19a *et seq.*) would have been involved, requiring suppression of records and statements for failure to adhere to such directives. *United States* v. *Heffner*, 420 F.2d 809 (C.A. 4); *United States* v. *Leahey*, 434 F.2d 7 (C.A. 1).

We do not rely on those I.R.S. directives either to urge that the *Miranda* rule be extended to non-custodial tax interrogations, an issue on which every circuit but one would be against us,[1] much less to suggest that those directives be applied retroactively according to their terms.

We do contend, however, and very emphatically, that the Internal Revenue Service's 1967 and 1968 directives constitute an admission, an admission on the part of the cognizant agency that it is unfair and unbecoming any individual representing the United States to conceal from a citizen being investigated that the investigation has a criminal prosecution in view.

The agents here concerned consciously concealed their purpose. The vice in their action was not merely that Carter's status as Special Agent was deliberately hidden, for, as the court below noted (*infra*, p. 12a), petitioner did not know what a Special Agent was or did. The gravamen of

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[1] *United States* v. *Dickerson*, 413 F.2d 1111 (C.A. 7) is the sole exception. The court below is *contra*, *United States* v. *Prudden*, 424 F.2d 1021, certiorari denied, 400 U.S. 831, as are the others; the cases are collected in *United States* v. *Jaskiewicz*, 433 F.2d 415, 417-18 (C.A. 3), certiorari denied, 400 U.S. 1021.

their conduct was that they covered up their preparation of a criminal prosecution. They never once used the word "criminal." That was a term certainly within the comprehension of a taxpayer with less than ten grades of schooling—and was undoubtedly the reason why it was never allowed to pass their lips.

More than that, the agents' conscious concealments in this case were compounded by two misrepresentations.

First, without at all urging that petitioner was entitled to be told specifically of his right to counsel, here he was specifically told by Revenue Agent Smith that the agents "would not be so crude as not to inform him in ample time that he should obtain an attorney" (A. 105, 107). But, in the event, they were indeed quite that crude. Having mentioned the matter of an attorney at all, they were certainly bound to be honest in doing so.

Second, after he already had all of petitioner's records safely in his possession, Special Agent Carter then advised him of his right to refuse to make incriminating statements, coupled with the comment that the privilege was inapplicable because the records had been received from third parties, viz., Agent Smith and accountant Brewer (A. 123-24).

Of course that statement was untrue; the only unprivileged records are those *belonging* to third parties, at least until prosecution is formally recommended. *Donaldson* v. *United States*, 400 U.S. 517. Here, however, the records in both instances belonged to petitioner, not to third persons, in consequence of which the privilege still attached. *United States* v. *Kordel*, 397 U.S. 1, 7; *Reisman* v. *Caplin*, 375 U.S. 440, 445.

Therefore, very plainly, the agent misrepresented the law, a circumstance that brings into play the rule that any concession obtained by misstatements of Government

agents, even by misstatements of law stemming from ignorance, is inadmissable. *Von Moltke* v. *Gillies*, 332 U.S. 708.[2]

In our view, this Court should emphatically declare that agents of the Government preparing to make a criminal case against a citizen must at a minimum warn him that they are doing so—and likewise refrain from piling affirmative misrepresentations on basic concealment.

A non-taxpayer is not *caput lupinum*. Nor should we ever forget what Mr. Justice Brandeis long ago observed (*Olmstead* v. *United States*, 277 U.S. 438, 471, 485): "Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example."

Second. Granting all of the foregoing, the problem here is how best to effect enforcement of appropriate standards in the resolution of the recurring and indeed endemic contest between, on the one hand, taxpayers unaware of all the courses open to them, and, on the other, government agents intent on application of criminal tax sanctions regardless of what they deem mere niceties.

The obvious solution, where as here there is substantial *prima facie* evidence that the incriminating admissions, statements, and records in question were obtained by fraud or trickery or deceit, is to apply the two-step procedure, first articulated in *Jackson* v. *Denno*, 378 U.S. 368, and since then legislatively prescribed by 18 U.S.C. § 3501(a), *infra*, p. 17a. And subsection (c) of the same section, which re-

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[2] We pause to note, simply to show that it has not been overlooked, that on this record there was, very clearly, no affirmative waiver of a known right. E.g., *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Ewspak* v. *United States*, 349 U.S. 290, 198. Certainly the petitioner's continuing to talk to the agents, contrary to his accountant's effort to terminate the interview, before petitioner had any inkling of his being entitled to a lawyer, does not and can not add up to a waiver of constitutional rights. The opinion below on that issue (*infra*, p. 13a) is not only quite untenable, it does not even read convincingly.

quires self-incriminating admissions of any kind to b treated as confessions, similarly codifies the earlier decisio in *Opper* v. *United States*, 348 U.S. 84, 90, 91, which firs treated the two on a parity.[3] The statute, following *Jackso* v. *Denno*, requires the use of procedures fully adequat to insure a reliable and clear-cut determination of the vol untariness of the admissions involved, procedures tha involve two steps.

First, the trial judge must conclude with unmistakabl clarity on the record that the admissions, etc., were ob tained voluntarily, i.e., not as the result of the agents' frau or deceit. And, second, if the trial judge is so satisfied then the ultimate issue of voluntariness must be left to th jury under suitable instructions.

Here neither step was taken. The district court's admis sion of the records and statements in question was as per emptory and quite as unilluminating as her original sup pression of both (Compare A 150 with ¶¶ 2 and 3 of A. 29 30). And, despite repeated requests (see appendix refer ences at p. 5, *supra*), the issue of deception was neve submitted to the jury.

Consequently, as the present record clearly shows, th question in this case that was central to the entire prose cution—Did the government agents resort to deceit to ob tain from the accused the materials essential to his con viction?[4] or otherwise stated, Did petitioner voluntarily turn over his records and make his statements?—that cen

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[3] "We think that an accused's admissions of essential facts o elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required * * * Such admissions have the same possibilities for error a confessions."

[4] The prosecution in its petition for rehearing of the distric court's original order of suppression asserted that it could no even proceed with its civil action against the petitioner unles it had his records (A. 148-49).

tral issue was never submitted to the jury, was never determined with the slightest particularity by the trial judge, and was only reconstructed by the court of appeals at second hand from a cold transcript (*infra*, pp. 8a-15a).

Thus the procedure followed and the result reached in this case add up to just precisely what *Jackson* v. *Denno*, 378 U.S. 368, and 18 U.S.C. § 3501 were designed to prevent and prohibit.

Consequently the issue of fraud and deceit in the present case, which was substantial enough to have resulted in a suppression order at the outset (A. 29-30, ¶¶ 2-3), should, after the trial judge later changed her mind, have been submitted to the jury for ultimate resolution as the statute requires. For, after all, the legislative command in § 3501 is applicable to all federal criminal cases, tax cases as well as all the rest, regardless of substantive changes in I. R. S. directives, regardless likewise of whether *Miranda* v. *Arizona*, 384 U.S. 436, continues as viable doctrine.

Third. Although the statute shows on its face that Congress undertook to codify the procedural teaching of *Jackson* v. *Denno*, 378 U.S. 368, the resultant legislative product has had some strange adventures.

(a) The Fifth Circuit, which early followed the rule of *Jackson* v. *Denno*, has emphasized in its latest expressions that the two-step procedure therein prescribed constitutes the fairest method of determining voluntariness. *United States* v. *Kershner*, 432 F.2d 1066, 1069-70; *United States* v. *Harper*, 432 F.2d 100, 101-02; *Kulyk* v. *United States*, 414 F.2d 139, 142-43; *Kristiansand* v. *United States*, 384 F.2d 301, 302; *Fisher* v. *United States*, 382 F.2d 31, 34-35. Yet that tribunal still appears unaware of § 3501, enacted in 1968, and in the present case refused to apply either the legislation or its own prior decisions.

(b) In the Third Circuit, the voluntariness/deceit issue was actually submitted to a jury trying a criminal tax

case. See *United States* v. *Jaskiewicz*, 433 F.2d 415, 421, certiorari denied, 400 U.S. 1021:

> "The jury in arriving at its general verdict determined the issue of fraud and deceit adversely to the appellant, and where the record supports such determination we cannot go behind that verdict."

But the same court had earlier—by way of studied dictum—ascribed to the statute a merely discretionary effect. *United States* v. *Panepinto*, 430 F.2d 613, 617-19 (C.A. 3), certiorari denied *sub nom. Orangio* v. *United States*, 400 U.S. 949.

That, surely, is a weird misreading. The statute on its face is mandatory, foreclosing any possibility of a merely discretionary submission to the jury. It says, not that the trial judge *may* permit the jury to hear relevant evidence bearing on voluntariness, it commands that "the trial judge *shall* permit the jury to hear relevant evidence on the issue of voluntariness." (Italics added.)

(c) Of course *Lego* v. *Twomey*, 404 U.S. 477, 489-90 (Part III), which rejected a state prisoner's contention that he was entitled to have the jury decide his claim of coercion anew, is inapplicable. That decision governs state cases only, and cannot prevail against 18 U.S.C. § 3501, which by its terms is applicable to every federal prosecution.

There seems no need at this juncture either to continue or to elaborate the discussion. The diversities already canvassed sufficiently emphasize the need for prompt clarification by this Court of the meaning and scope of 18 U.S. § 3501.

CONCLUSION

The procedural issue now presented turns on the presently misunderstood meaning of a vital statute. Once the sweep of that enactment has been formulated, the resultant decision will be determinative no matter what rules governing revenue agents' behavior and obligations are prescribed, whether judicially or administratively, whether now or hereafter. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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MAY 1972.

APPENDIX A

OPINION BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1407

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

MARVIN D. BLAND, *Defendant-Appellant.*
Appeal from the United States District Court for the Northern District of Texas

(April 5, 1972)

Before TUTTLE, INGRAHAM and RONEY, Circuit Judges.

INGRAHAM, Circuit Judge: This is an appeal from a conviction of tax evasion in violation of 26 U.S.C. § 7201. Appellant Bland was a manufacturer's representative for World Carpet Mills of Dalton, Georgia. Appellant was charged with the substantive offense of tax evasion for the years 1962 through 1964, inclusive. While appellant does not seriously dispute that over $58,000 in taxes are due and owing to the United States, he volubly disputes the presence of any intent to evade taxes.

On appeal appellant's case rises or falls on two issues raised by preliminary motions and preserved for appeal.

I.

A TIME-BARRED PROSECUTION

A complaint concerning calendar years 1962 through 1964 was filed on April 10, 1969, only five days before the six year statute of limitations in fraud cases, 26 U.S.C.

§ 6531, expired on his 1962 tax return.[1] The filing of the complaint triggered the proviso of § 6531 and permitted the Government to bring its case before a grand jury after April 15, 1969.[2]

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[1] "No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue law unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, or a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof."

[2] "Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the

The appellant's case was taken before a grand jury on June 2, 1969. The grand jury, however, declined to indict Bland and returned a "no-bill." Subsequently, after the initial grand jury was discharged in due course, the Government brought appellant's case before the succeeding grand jury. This grand jury returned a three count indictment on September 18, 1969.

As the indictment was returned more than six years after April 15, 1963, the date on which appellant filed his 1962 tax return, it is barred by the statute of limitations, 26 U.S.C. § 6531, unless saved by the proviso:

> "* * * * Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable."

Appellant, unlike others who have previously asserted limitations against their prosecutions under § 6531, see, e.g., *Jaben* v. *United States*, 381 U.S. 214 (1965); *United States* v. *Meriwether*, 440 F. 2d 753 (5th Cir., 1971), does not contest the sufficiency of the complaint and accompanying procedures which triggered the nine-month proviso. Rather appellant asserts that the extension granted by the proviso expired when the first grand jury presented with the complaint elected not to indict. He argues that the grand jury's "no-bill" was the equivalent of a dismissal of the complaint and vitiated the time extension. The Government, however, contends that the extension is

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making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable."

absolute upon the filing of a valid complaint. In its view the succeeding grand jury was not bound by its predecessor's decision not to indict. See *United States* v. *Thompson*, 251 U.S. 407 (1920).

A consideration of these arguments requires our examination of the proviso and its place in the statutory scheme. § 6531 is a general three year statute of limitations. An exception to the three year period is made in certain classes of cases, including fraud and willful tax evasion. The period of limitations for such cases is six years. The proviso we speak of is that in the event the Government has filed a complaint within the applicable period of limitations, the period of limitations is extended until a date which is nine month after the date the complaint was made.

A literal reading of the statute and proviso as the Government urges would make the applicable period of limitations in this case six years and nine months less five days. See *United States* v. *Grayson*, 416 F. 2d 1073 (5th Cir., 1969).

We are, however, unconcerned with the terminal date of the proviso extension. We are concerned with whether the refusal to indict by the grand jury in session at the time the complaint was filed cuts off further extension of the applicable period of limitations. In *Jaben* v. *United States*, *supra*, the Supreme Court articulated the purpose of the § 6531 proviso. The Court there stated:

> "More basically, the evident statutory purpose of the nine-month extension provision is to afford the Government an opportunity to indict criminal tax offenders in the event that a grand jury is not in session at the end of the normal limitation period. This is confirmed by the immediate precursor of the present section which provided for an extension 'until the discharge of the grand jury at its next session within the district.' I.R.C. 1939, § 3748(a). Clearly the statute was not meant to grant the Government

greater time in which to make its case (a result which could have been accomplished simply by making the normal period of limitations six years and nine months), but rather was intended to deal with the situation in which the Government has its case made within the normal limitations period but cannot obtain an indictment because of the grand jury schedule. The Government's interpretation does not reflect this statutory intention, for it provides no safeguard whatever to prevent the Government from filing a complaint at a time when it does not have its case made, and then using the nine-month period to make it.

"The better view of § 6531 is that the complaint, to initiate the time extension, must be adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules. It must be sufficient to justify the next steps in the process—those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing. To do so the complaint must satisfy the probable cause requirement of Rule 4. Furthermore, we think that the Government must proceed through the further steps of the complaint procedure by affording the defendant a preliminary hearing as required by Rule 5, unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment. This interpretation of the statute reflects its purpose by insuring that within a reasonable time following the filing of the complaint, either the Commissioner will decide whether there is sufficient cause to bind the defendant over for grand jury action, or the grand jury itself will have decided whether or not to indict. A dismissal of the complaint before the indictment is returned would vitiate the time extension."

In addition to the Supreme Court's formulation of the purpose and effect of the § 6531 proviso, two other con-

sideration are urged which it is asserted compel a decision in favor of appellant. First, this is not a case in which the Government needed the entire six years from the filing of appellant's return to build its case against him. The prosecution in argument before the district court conceded that its case was completed by the end of February of 1966. The election to defer filing of a complaint or obtaining an indictment until five days before the period of limitations expired on the 1962 count was and remains unexplained.

The delay incident in this case leads to the second consideration; that is, whether the appellant's right to a fair and speedy trial has been violated. Recently the Supreme Court in *United States* v. *Marion*, — U.S. —, 40 LW 4092 (December 20, 1971), adopted the view of this and several other circuits and held in the usual case [3] that the protection of the Sixth Amendment was inapplicable to the period prior to arrest.[4]

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[3] *United States* v. *Judice and Merritt*, —— F.2d —— (5th Cir., 1972 [No. 71-2526, February 16, 1972].

[4] In *Marion*, the Supreme Court explicitly held:

"* * * So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engages the particular protections of speedy-trial provision of the Sixth Amendment.

"*Invocation of the speedy-trial provision thus need not await indictment, information or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest.* Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case." (Italics added).

The delay which most often occurs, as in the case at bar, is from the commission of the alleged offense (here on April 15, 1963, when the return was filed) until the indictment is returned. The Supreme Court noted, however, that the individual is not left remediless for excessive pre-arrest delay.

> "The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States* v. *Ewell supra*, at 122, 'the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.' Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the respose (sic) of society and the protection of those who may [during the limitation] . . . have lost their means of defense.' *Public Schools* v. *Walker*, 76 U.S. (9 Wall.) 282, 288 (1869). These statutes provide predictability by specifying a limit beyond which there is an irrebutable assumption that a defendant's right to a fair trial would be prejudiced."

But, as the Supreme Court in its *Marion* opinion also points out, it is Congress which, in the first instance, must establish what is a facially reasonable time for the bringing of prosecutions. Even the liberal policy in favor of repose, *United States* v. *Marion, supra; United States* v. *Habig*, 390 U.S. 222, 227 (1967), can not overcome the plain meaning of an unambiguous statute. The extension provided by the Congress in the proviso to § 6531 is by its terms absolute. A sufficient complaint having been filed during the prime period of the statute, the government is entitled to make its presentation to the grand jury or juries, should the need arise, until the expiration of a time nine months from the filing of the complaint with the commissioner. The return of a "no-bill" does not alter

this result. Compare *United States* v. *Ponder*, *supra* at 822; *Mende* v. *United States*, 282 F. 2d 881 (9th Cir., 1960). We conclude as did the district court that the prosecution under Count I of the indictment was not time-barred.

Notwithstanding the appeal of the concurrent sentence doctrine, appellant's contentions of governmental overbearing in obtaining relevant information and materials require that we consider his second argument.

II.

Motion to Suppress

By motion to suppress and by motion for judgment of acquittal at the close of the case, appellant has raised the issue of whether statements and information obtained after November 3, 1965, when a Special Agent of the Intelligence Division[5] first contacted Bland, were admissible into evidence.

The district court initially granted appellant's motion to suppress, but on rehearing, and after the question of whether the Revenue Agent could testify to what he had observed before the Special Agent entered the case had been briefed, the district court reversed itself and denied the motion. By motion, after a verdict had been returned against him, appellant adequately preserved this point for appeal.

On November 3, 1965, the Special Agent assigned Bland's case accompanied the Revenue Agent to the office of Bland's accountant. The Revenue Agent, without introducing the Special Agent as such, requested the accountant to release Bland's original records which the

[5] A word of background. The Intelligence Division of the Internal Revenue Service accepts cases referred to it by Revenue Agents conducting routine audits of tax returns. The Intelligence Division's function is to investigate these referred "fraud" cases, with a view towards initiating criminal proceedings.

Revenue Agent had previously audited in the accountant's offices. Bland's accountant refused to permit the agent to remove the records without either Bland's consent or an investigative summons. Having thus been refused, both agents left the accountant and went to the carpet company's Dallas warehouse to examine that corporation's records. While there the agents met appellant returning from a business trip. The Revenue Agent introduced the Special Agent to appellant as another man with the Government. The Special Agent neither identified himself nor gave the reason for his presence. At the Special Agent's request Bland called his accountant who released the original records.

Appellant argues that the records should not be allowed into evidence. He asserts that the presence of the Special Agent signaled that the inquiry into his tax returns had become criminal and that he was entitled to the full protection of the guidelines of the Internal Revenue Service then in force. Appellant does not argue that the Special Agent on November 3, 1965, was required to give a series of *Miranda* warnings. Realizing such argument's futility, *United States* v. *Ponder*, 444 F.2d 816 (5th Cir., 1971); *United States* v. *Tonahill*, 430 F.2d 1042 (5th Cir., 1970); *United States* v. *Prudden*, 424 F.2d 1021 (5th Cir., 1970), he asserts that the Special Agent's failure to identify himself or the changed status of the investigation constituted a fraud, deceit or trickery and invalidated the consent to agency possession of his records. Appellant places heavy reliance upon the following statements from *United States* v. *Prudden* and *United States* v. *Tonahill*, *supra*:

> "Prudden points to the failure of Special Agent Cohen to tell him that his function was to investigate for criminal fraud. All Cohen was required to do by the then existing Internal Revenue Service requirements was to tell Prudden that he was a Special Agent and show Prudden his credentials. This he did. He in no way concealed his true identity. He could not

have affirmatively mislead Prudden as to the function of the Intelligence Division or as to the duties of a special agent, since neither of these subjects were ever discussed. Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading. None of these facts were present here." 424 F.2d 1032.

"Of course, there is no question, as *Prudden* pointed out, that Revenue Agents cannot obtain information from taxpayers by fraud, trickery or deceit which misrepresents the nature of the search. But there must be 'acts by the agent[s] which *materially* misrepresent the nature of the inquiry' before there is fraud, trickery or deceit and 'the record • • • must disclose some affirmative misrepresentation to establish the existence of fraud, and *this showing must be clear and convincing.' Prudden* at p. 1033 (emphasis added)." 430 F.2d 1044-1045.

Appellant asserts and the record demonstrates that the Special Agent did not inform Bland that he was with the Intelligence Division. Further, neither Bland nor his accountant were apprised of the shift in emphasis from civil to criminal consequences.

While the mere presence of a special agent has no independent relevance in determining whether a particular examination and audit is directed towards civil or criminal consequences, *Donaldson* v. *United States*, 400 U.S. 517 (1971), at 535, the record at bar clearly demonstrates that before November 3, 1965, the Special Agent was contemplating criminal consequences. The record, however, also demonstrates that the Revenue Agent had full access to the particular records obtained for several months before November 3, 1965, and may have photocopied them at that time. The Special Agent desired the originals in his office

to assist in preparing the case against appellant. Under these circumstances, had the Special Agent sought judicial enforcement proceedings of a summons issued to compel the accountant to produce the records, enforcement would have been denied. See *United States* v. *Newman*, 441 F.2d 165 (5th Cir., 1971); *United States* v. *Mercurio*, 418 F.2d 1213 (5th Cir., 1969), aff'd sub nom., *United States* v. *Donaldson*, 400 U.S. 517 (1971); *Stuart* v. *United States*, 416 F.2d 438 (5th Cir., 1969). Appellant, however, consented to the release of the original records. Unless that consent was involuntary, the records were properly admissible. *United States* v. *Ponder*, *supra*.

In *Prudden* v. *United States*, *supra*, we held:

> "We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, *absent any acts by the agent which materially misrepresent the nature of the inquiry*, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to establish the existence of fraud, and this showing must be clear and convincing." (Emphasis added.)

Appellant asserts that his case falls within the rule enunciated by *Prudden* inasmuch as the Special Agent was under a duty[6] to disclose his identity and that his silence

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[6] The Internal Revenue Service guidelines for special agents then in force:

> "MT 9900-12 (7-30-65) IR Manual stated as follows:
> 242.13. *Duty to Inform Taxpayer of His Rights*
>
> (1) It is not essential to the admissibility of a defendant's testimony that he should first have been informed that what he said might be used against him in a criminal case, provided his statement was freely and understandingly given. The same rule applies to books and records submitted voluntarily for examination. Neither is the Government obliged to keep a

was a material misrepresentation of the nature of the inquiry.

While we might be willing to accept that the Special Agent's silence, in circumstances where the Internal Revenue Service had imposed a duty upon him to speak, was a misrepresentation, *Prudden, supra*, 1032 at n. 21; *United States* v. *Leahey*, 434 F.2d 7 (1st Cir., 1970); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir., 1970), we are unable to find an indication of its materiality. It is hornbook law that for a misrepresentation to have legal effect, it must have been material. The Government may not use fraud, deceit or trickery to obtain information by consent, but one who would assert these grounds to vitiate the consent under *Prudden* must be able to demonstrate that the asserted misconduct has affirmatively misled him, *United States* v. *Stribling*, 437 F.2d 756 (6th Cir., 1971); *United States* v. *Sclafani*, 265 F.2d 408 (2d Cir., 1959), or demonstrate from the totality of the circumstances that his statements were involuntary. *United States* v. *Willoz*, 449 F.2d 1321 (5th Cir., 1971); *United States* v. *Montos*, 421 F.2d 215 (5th Cir., 1970). The record here demonstrates that appellant was not misled by the Special Agent's silence for, as he testified, he did not know the difference between a special agent and a revenue agent. (See Motion, Tr. 81-82) Fur-

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taxpayer informed of the changing course of a tax investigation, but its agents must refrain from trickery, misrepresentation, or deception. The taxpayer is expected to know that anything he offers the Government in a tax investigation may be used in a criminal prosecution, and he cannot later successfully argue that he gave the information only for civil purposes. As stated in the Frank case * * *:

> " 'Under the statutes the government has authority to examine books, papers, and records, and we do not think any taxpayer considers an audit by a revenue agent to be a call for purely social purposes.' "

See also *United States* v. *Prudden*, *supra*, at n. 14.

ther, although we are only speculating about the existence of photocopies made by the Revenue Agent, the Revenue Agent could testify to authenticate the copies of the records he had audited prior to the entry of the Special Agent. Certainly he could testify from his own recollection. See *Weaver* v. *United States*, 374 F.2d 878 (5th Cir., 1967).

We conclude that the original records were properly admitted into evidence.

This, however, does not end appellant's arguments. He asserts a similar argument seeking to exclude statements made by the taxpayer during conferences with the Special Agent on November 9, 1965, November 15, 1965 and February 10, 1966.

At the first conference on November 9, 1965, Bland, in the company of his accountant, went to the offices of the Internal Revenue Service. When the accountant observed that the suite of offices were those of the Intelligence Division, he suggested that appellant obtain an attorney. Appellant did not immediately follow his accountant's advice or request termination of this conference. Over the accountant's repeated objections, appellant consented to answer what were described as general questions. At the close of this conference during which the agents learned of Bland's safe deposit box, they requested that appellant accompany them and open the box for inspection. Bland, as in all other matters the agents had requested, complied. Before opening the box Bland explained that the box contained a $10,000 bill. The box was found to contain three $10,000 bills. Appellant argues that evidence of the $30,000 in the safe deposit box should have been suppressed. Appellant's argument, however, is unpersuasive. On November 9, 1965, the appellant was given full knowledge of his rights by the joint admonitions of the accountant and the Special Agent. There is no reversible error here. See also *United States* v. *Nemetz*, 450 F.2d 924 (3d Cir., 1971).

After the second conference of November 15, 1965, at which appellant was visibly upset, he approached the Revenue Agent and questioned him as to whether he needed an attorney. The Revenue Agent replied: "Contrary to what you may have heard about the Internal Revenue Service, they would not be so crude as not to inform you in ample time that you should obtain an attorney." This occasion, however, produced neither statement nor evidence[7] and, consequently, there is no error. F.R.Crim.P., 52(a).

The third conference occurred on February 10, 1966, when Bland met with the Special Agent. At that time the Special Agent read Bland all the essential Miranda warnings and asserted that since he had appellant's record from third parties (either the Revenue Agent or Bland's accountant), they were not privileged. Appellant then answered his questions and at trial, after timely objection, the Special Agent testified as to Bland's answers. Appel-

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[7] Had evidence from this conference been introduced at appellant's trial, we would face consideration of whether appellant's statements made in circumstances of manifest discomfiture were the equivalent of an in-custody interrogation. If a situation which could be characterized as psychological custody were demonstrated, a defendant's statements made without benefit of the *Miranda* warnings would be inadvisable. See *Miranda* v. *Arizona*, 384 U.S. 436 at 457 (1969). Compare the circumstances in *Orozco* v. *Texas*, 394 U.S. 324 (1969), with *Mathis* v. *United States*, 391 U.S. 1 (1968). In applying these considerations a case by case examination for all of the compulsive factors of *Miranda* must be made. *United States* v. *Montos*, 421 F.2d 215 (5th Cir., 1970). Whether an individual has the physical freedom to break off an interview or refuse to answer any further questions is but one factor to be considered in determining whether the interrogation was custodial.

These considerations demonstrate the wisdom of the IRS News Release IR-949 (1969 CCH Fed.Tax Rptr. ¶ 69-46) which accedes to the Seventh Circuit's requirement of *Miranda* warnings in tax fraud cases. See *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir., 1969). Consequently, any holding in a case such as Bland's is of limited precedential value.

lant asserts that the Special Agent's testimony must be stricken since the assertion made to appellant was false.

However, in light of our previous holding concerning appellant's records, we find no reason to reach this question.

Appellant's contention concerning the district court's charge to the jury is lacking in merit. After full consideration of Appellant's remaining arguments, a close review fails to demonstrate error rising above the requirements of F.R.Crim. P. Rule 52(a).

The judgment of the district court is AFFIRMED.

APPENDIX B

JUDGMENT BELOW

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1407

D. C. Docket No. CR 3 1717

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

MARVIN D. BLAND, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Texas

Before Tuttle, Ingraham and Roney, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 5, 1972

APPENDIX C

STATUTES AND DEPARTMENTAL DIRECTIVES INVOLVED

1. Nothing turns on the terms of 26 U.S.C. § 7201, the substantive provision for violation of which petitioner stands convicted.

2. Section 3501 of Title 18, United States Code, provides in pertinent part as follows:

"§ 3501. Admissibility of confessions

"(a) In any criminal prosecution brought by the United States * * *, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

* * * * * * * * * *

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

3. Part IX of the Internal Revenue Manual deals with the Intelligence Division of the IRS. Section 9384 thereof provided in pertinent part in 1965 and 1966 as follows (A. 80-82):

"9384 Constitutional Rights.

9384.1 *General*

* * * * * * * * * *

9384.2 *Precautions to be Taken*

"(1) In order that any statement or evidence, including books, records, memoranda or papers of a possible individ-

nal defendant, will not be inadmissible as evidence in a trial of that defendant, the special agent shall take the following precautions:

(a) When it appears that a natural person may be a possible defendant in a criminal trial, positive steps shall be taken to ensure that any evidence he submits is submitted voluntarily or that he knows and understands, before he submits, orally or otherwise, any such evidence, that he is not required to furnish evidence which he believes might incriminate him directly or indirectly under any law of the United States. When appropriate, he should be informed of these rights. This information should not be given in language so formal or so couched as to unnecessarily alarm the person interviewed. Deception, fraud, or deceit will not be practiced to obtain such evidence.

(b) The extent of the steps to be taken to obtain the above assurance may vary according to the circumstances. For example, information that the possible defendant has discussed this matter with an attorney may suffice; or, the special agent should forthrightly explain these constitutional rights if he receives a question relating to them.

(c) A record shall be made of the precautions taken in every case."

4. The Special Agent's Handbook, in force between June 1954 and December 1956, provided in Section 242.13 as follows (opinion below, *supra*, pp. 11a-12a, note 6; A. 83):

"**242.13 Duty to Inform Taxpayer of His Rights**

"(1) It is not essential to the admissibility of a defendant's testimony that he should first have been informed that what he said might be used against him in a criminal case, provided his statement was freely and understandingly given. The same rule applies to books and records

submitted voluntarily for examination. Neither is the Government obliged to keep a taxpayer informed of the changing course of a tax investigation, but its agents must refrain from trickery, misrepresentation, or deception. The taxpayer is expected to know that anything he offers the Government in a tax investigation may be used in a criminal prosecution, and he cannot later successfully argue that he gave the information only for civil purposes. As stated in the Frank case [*United States* v. *Frank*, 245 F.2d 284, 286 (C.A. 3)] * * *:

> "'Under the statutes the government has authority to examine books, papers, and records, and we do not think any taxpayer considers an audit by a revenue agent to be a call for purely social purposes.'"

"(2) Although the preceding paragraph summarizes general legal principles, a special agent, to avert any attack upon the admissibility of any statement or documentary evidence furnished by a taxpayer should inform him at the beginning of a formal question and answer interview, that he is not required to furnish evidence which he believes may incriminate him under any Federal law."

5. On October 3, 1967, the Internal Revenue Service issued instructions to all Special Agents of its Intelligence Division that read in pertinent part as follows (*United States* v. *Heffner*, 420 F.2d 809, 811 [C.A. 4]):

> "On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'
>
> "If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

* * * * * * * * *

"IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons."

6. The foregoing instructions were implemented in 1968 by the following revision of the Special Agents' Handbook (A. 85-87):

"242.132—Non-Custodial Interrogations

"(1) At the outset of the initial interview with the subject of an investigation, the special agent will properly identify himself as a special agent of the Internal Revenue Service and will produce his authorized credentials to the subject for examination. He will also state that, as a special agent, he has the function of investigating the possibility of criminal tax fraud (or the particular offense under investigation).

"(2) At the first official contact after the case has been numbered as a full-scale investigation, the special agent will advise the subject of the investigation of his constitutional rights if he has not so advised the subject prior to that time. In determining when a case should be numbered as a full-scale investigation, particular attention will be given to that portion of IRM 9323 which provides that extended investigation will not be conducted under the guise of a preliminary investigation.

"(3) The phrasing of the advisory statement to the subject will be along the following lines:

'In connection with our investigation of your tax liability, I would like to ask you some questions. However, first I advise you that you have a right under the Fifth Amendment to the Constitution of the United States to refuse to answer any questions or to submit any information if you feel that such an-

swers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any proceeding which may be undertaken by the United States. I advise you further that you may, if you wish, be represented by counsel.'

"(4) If the subject requests clarification, either as to his rights or the purpose of the investigation, the special agent will give such explanation as is necessary to clarify the matter for the subject.

"(5) In each full-scale investigation, the special agent will make a contemporaneous memorandum stating when and where the subject was advised of his constitutional rights; what additional explanation, if any, was made; and who was present at the time.

"(6) A special agent, to avert any attack upon the admissibility of any statement or documentary evidence furnished by a subject under investigation, will inform him of his constitutional rights at the beginning of a formal question and answer interview, even if the individual was previously advised."

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1436

MARVIN D. BLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the court of appeals (Pet. App. 1a-15a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1972. The petition for a writ of certiorari was filed on May 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly admitted into evidence statements made by and records belonging to petitioner over petitioner's objection that the evidence was obtained by fraud and deceit practiced by agents of the Internal Revenue Service.

STATEMENT

Petitioner was convicted after a jury trial of willfully attempting to evade his personal income taxes for 1962, 1963 and 1964, in violation of Section 7201 of the Internal Revenue Code of 1954 (R. 1–2, 206).[1] Petitioner, a manufacturer's representative, failed to report as income reimbursements for telephone expenses initially paid by petitioner in 1962 ($21,910.09; R. 443), in 1963 ($28,069.53; R. 444), and in 1964 ($30,052.28; R. 444).

During a routine audit (R. 90), a revenue agent of the Internal Revenue Service met with the accountant who prepared petitioner's tax returns and the agent was given (R. 93–96, 256–284), with petitioner's consent (R. 609), certain of petitioner's records and a summary schedule prepared by the accountant of telephone expense reimbursement checks (R. 311–316, 329, 335, 607A, 609). A special agent of the Intelligence Division was thereafter assigned to investigate the case for possible fraud and criminal violations (R. 97, 108–109.) The accountant refused to furnish the records to the special agent without permission from petitioner (R. 112). The special agent was subsequently introduced to petitioner by the revenue agent only as an employee of the Internal Revenue Service (R. 112, 347); petitioner testified it would have meant nothing to him had the special agent been fully identified (R. 48–49). After this meeting, petitioner instructed the accountant to give the records to the special agent (R. 112–114). The records which

[1] "R." references are to the appendix filed in the court below.

were furnished to the special agent on this occasion were the same records previously examined by the revenue agent (R. 284, 341–342).

On November 9, 1965, petitioner, accompanied by his accountant, met with the agents at the office of the Intelligence Division and was advised by the special agent of his title and his function to investigate suspected internal revenue violations (R. 13, 115). Petitioner, on this occasion, acknowledged that he understood the agent's warning that he was not required to furnish records or information which was incriminating (R. 115). Petitioner's accountant, being aware that the investigation was being conducted by the Intelligence Division (R. 613), objected to the absence of an attorney and to the scope of the agent's questions (R. 69–70, 117, 614). Petitioner directed the agents to "go ahead" (R. 635), made no objection to questions and admitted that he had received and failed to report the telephone expense reimbursements (R. 342–343, 636).

Petitioner had two later meetings with the agents. On November 15, 1965, he had a casual encounter and cup of coffee with the revenue agent (R. 327). He asked the agent what to do about his accountant's advice to get an attorney, and was told by the agent that he could not advise him but that the Internal Revenue Service would "not be so crude as not to inform him in ample time that he should obtain an attorney" (R. 327–328, 332). On February 10, 1966, petitioner met again with the special agent, who disclosed his function to determine if the

understatement of taxes was intentional, and warned petitioner of his rights to an attorney and not to incriminate himself (R. 119–120). The special agent told petitioner that records of petitioner which had previously been obtained from third parties were not subject to petitioner's self-incrimination privilege (R. 123).

Prior to trial, petitioner moved to suppress from evidence his records and statements obtained by the special agent on the ground that he had not been properly advised by the Internal Revenue Service of the criminal nature of the investigation and of his constitutional rights (R. 14, 26). After an evidentiary hearing (R. 43–125) and oral argument (R. 130–146), the district court initially granted the motion to suppress (R. 146). But upon reconsideration at the government's request, an order was entered denying the motion to suppress (R. 148–150). Petitioner renewed his motion to suppress at trial, but was again unsuccessful (R. 304).

The district court denied (R. 190) petitioner's request (No. 40; R. 181) that the jury be instructed that any statements made by the defendant were not admissible and should be disregarded unless the evidence showed beyond a reasonable doubt that the statement was voluntary and made after petitioner was advised of his right to counsel and to remain silent.

The court of appeals affirmed petitioner's conviction, upholding the denial of the motion to suppress on the grounds that petitioner effectively consented to the transfer of the records on November 9, 1965, and, in subsequent interviews, was either aware of his

rights or had furnished no evidence (Pet. App. 11a, 13a–15a).

ARGUMENT

Petitioner does not assert here that the agents in investigating him failed to comply with applicable Internal Revenue Service directives or that he should have been given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436[2] (see Pet. 7), but contends solely that he was prejudiced by the district court's failure to apply a two-step procedure in determining the voluntary nature of his admissions. In our view, this contention is without merit. Moreover, the underlying substantive issue is of limited importance, since, as petitioner recognizes (Pet. 7), the Internal Revenue Service has since October 1967 required special agents to identify themselves upon initial contact with a taxpayer and state that they are investigating the possibility of criminal tax fraud (Pet. App. 19a). Review by this Court thus seems unwarranted.

1. Petitioner's contention (Pet. 10) that the record does not disclose whether the district court found that petitioner's admissions were obtained voluntarily is unfounded. The requirement of a preliminary deter-

[2] The Fifth Circuit has repeatedly adhered to the rule that, in cases of non-custodial interrogation in Internal Revenue Service investigations, *Miranda* warnings are not required. *United States* v. *Prudden*, 424 F. 2d 1021, certiorari denied, 400 U.S. 831; *United States* v. *Ponder*, 444 F. 2d 816, 819, certiorari denied, 405 U.S. 918. This is the rule generally followed in the circuits. *United States* v. *Jaskiewicz*, 433 F. 2d 415, 420 (C.A. 3) (citing cases), certiorari denied, 400 U.S. 1021. Only the Seventh Circuit has ruled otherwise. *United States* v. *Dickerson*, 413 F. 2d 1111, 1116–1117 (C.A. 7).

mination by the trial court on the voluntary nature of a defendant's admissions does not mandate express findings in each case by the trial judge, but is satisfied where the issue is clearly raised, heard and decided and where "the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary." *Jackson* v. *Denno*, 378 U.S. 368, 378–379; *Sims* v. *Georgia*, 385 U.S. 538, 544; *Lego* v. *Twomey*, 404 U.S. 477, 484; *United States* v. *Smith*, 418 F. 2d 1294, 1295 (C.A. 5); *Sheer* v. *United States*, 414 F. 2d 122, 125 (C.A. 5), certiorari denied, 396 U.S. 946; *United States* v. *Chapman*, 448 F. 2d 1381, 1386–1387 (C.A. 3); *Helmick* v. *Cupp*, 437 F. 2d 321, 323 (C.A. 9). Petitioner has not suggested that a different rule should apply with respect to the statutory requirement of 18 U.S.C. 3501(a) that the trial judge shall initially determine any issue as to the voluntariness of a confession.

In this case, the record shows with "unmistakable clarity" (*Sims* v. *Georgia*, *supra*, 385 U.S. at 544) that the issue whether petitioner's admissions were voluntary was fully litigated and resolved against petitioner. The district court vacated its first order and denied the motion to suppress after the government, by its motion for rehearing, brought to the court's attention an intervening decision of the Fifth Circuit, *United States* v. *Tonahill*, 430 F. 2d 1042, certiorari denied, 400 U.S. 943. In *Tonahill*, on appeal by the United States from an order suppressing admissions made by a taxpayer to revenue and special agents, the court held that no deceit was practiced

simply because the agents only informed the taxpayer that they were investigating "large discrepancies" and made no reference to the possible criminal aspects of the investigation. As petitioner's argument in this case is that the agents' failure to refer to the possible criminal aspects of their investigation constituted deceit, the relevance of *Tonahill* and the nature of the district court's ruling here are unmistakably clear.

2. Petitioner also argues that under 18 U.S.C. 3501, the issue of voluntariness should have been submitted to the jury. Section 3501 requires in pertinent part:

> (a) In any criminal prosecution brought by the United States * * *, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> * * * * *
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

While the statute appears to direct that the jury consider evidence of voluntariness in deciding what weight to give a confession, the responsibility under the statute for deciding whether a confession is or is not voluntary and whether or not it is admissible in

the court's. Petitioner, without referring to the statute, requested the court to instruct the jury to decide the basic question of admissibility (R. 181-182), and this the court properly declined to do. Cf. *Lego* v. *Twomey*, 404 U.S. 477, 489-490.

Although the court on its own might have given an instruction along the lines of 18 U.S.C. 3501, the failure to do so was not plain error. Since petitioner's claim that his admissions were involuntarily related only to the alleged deceit of the government agents, not to the possibility that his statements were made under coercive pressure, the determination of voluntariness turned solely on a legal assessment of the agents' conduct. There was no indication that the statements were inaccurate or should not be given full weight, and thus an instruction to the jury to consider their weight in light of the evidence concerning voluntariness would have been superfluous.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1436

MARVIN D. BLAND, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY MEMORANDUM

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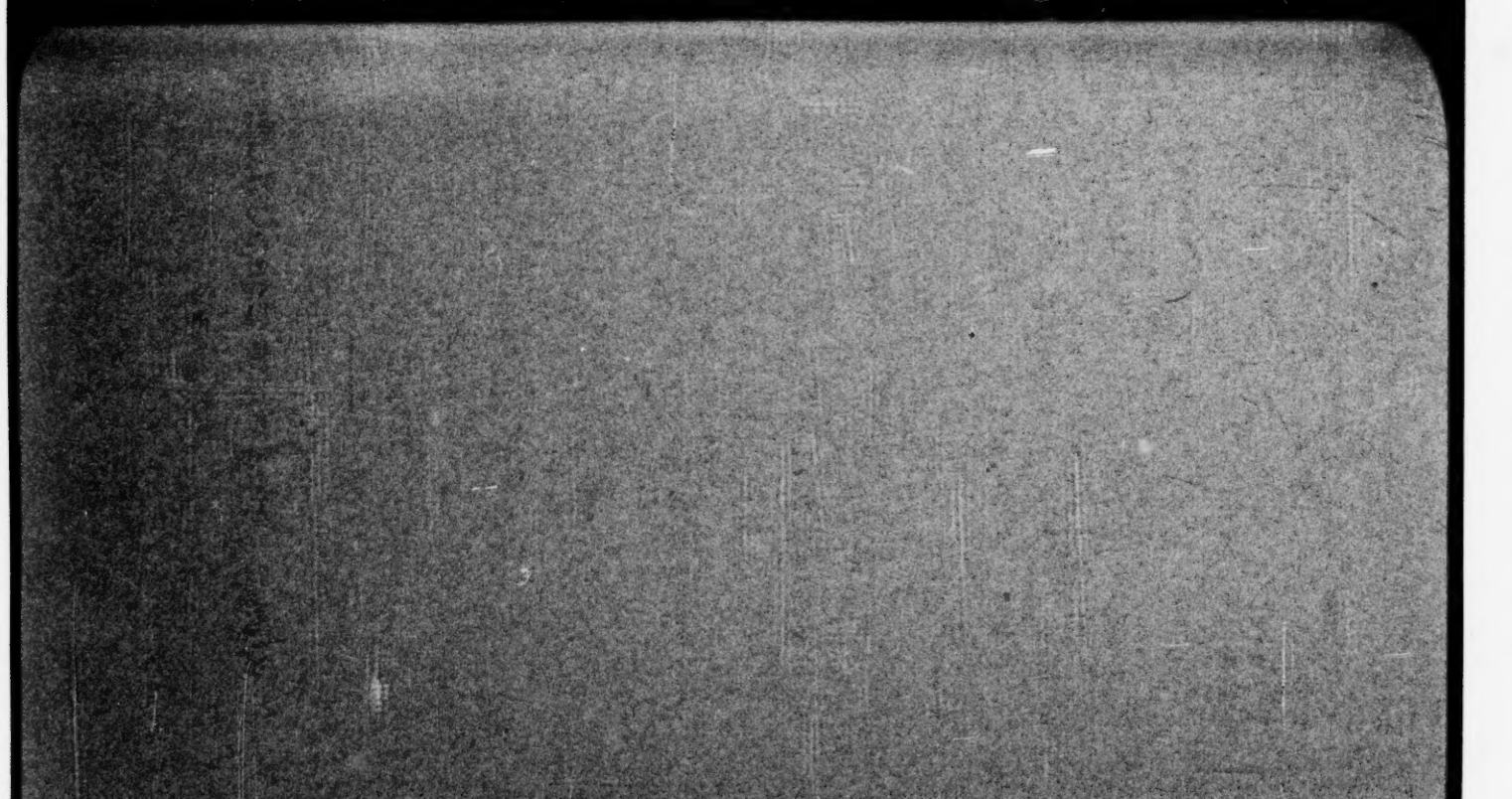

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Even under the narrow scope now available for replies when a petition for certiorari is under consideration, two glaringly misleading statements in the brief in opposition call for prompt and incisive rectification.

First. The prosecution seeks to excuse the trial court's studied refusal to instruct the jury on the question of admissibility on the strength of *Lego* v. *Twomey*, 404 U.S. 477, 489-490 (Br. Op. 8).

But that decision involved collateral habeas corpus review of a state conviction, not, as here, direct review of a federal conviction. The present case, therefore, is governed, not by *Lego* v. *Twomey*, but by the plain words of an Act of Congress, 18 U.S.C. § 3501(a),

which provides that after a trial judge has determined that a confession (or other oral self-incriminatory statement, see subsection (e); Pet. App. 17a) has been voluntarily made, it shall be admitted in evidence—

> "and the trial judge *shall* permit the jury to hear relevant evidence on the issue of voluntariness * * *."

The operative word is *shall*. But the prosecution refuses to give that decisive direction any effect at all, and asks this Court to ignore a studied disregard of the statutory requirement on the part of both courts below.

Second. By suggesting a dichotomy between "the alleged deceit of the government agents" and "the possibility that [petitioner's] statements were made under coercive pressure" (Br. Op. 8), the prosecution would have this Court draw a distinction in suppression cases between force on the one hand and stealth, guile, subterfuge, surreptitiousness and deceit on the other, an asserted distinction that has been consistently rejected over the years.

The two were first held identical in *Gouled* v. *United States*, 255 U.S. 298, 305-306, decided more than half a century ago, and, unless *Shepard's Citations* have suddenly become fallible, it is clear that the Court has never deviated in holding evidence wrongfully obtained by fraud to require exclusion quite as much as evidence acquired through improper use of force.

Indeed, the identity of both illegal means has been specifically reaffirmed. *On Lee* v. *United States*, 343 U.S. 749, 753 ("unlawful seizure may violate the Fourth Amendment, even though the entry itself was by subterfuge or fraud rather than force"); *Hoffa* v.

United States, 385 U.S. 293, 301 ("The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area"). And of course oral statements can be the subject matter of an unlawful seizure. *Silverman* v. *United States,* 365 U.S. 505.

Third. The fact that petitioner's substantive contention was originally sustained by the district court (A. 29-30) amply shows that it was substantial and that he does not, in Judge Learned Hand's phrase, "clutch at gossamers." *Rotondo* v. *Isthmian Steamship Co.,* 243 F.2d 581, 584 (C.A. 2).

Under the statute he was entitled to have the factual issue of voluntariness submitted to the jury; failure to grant his repeated requests that this be done (A. 181-82, No. 40; A. 200-03, Nos. 11-20) constituted flagrant disobedience of the statutory mandate.

That failure to comply should not be permitted to pass unredressed, even in a single case; and because the matter is so plain on the present record, summary rather than plenary consideration might well suffice to effect enforcement of the Congressional direction.

Respectfully submitted.

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JULY 1972.